Lee Geok Theng v Ngee Tai Hoo & Anor

HIGH COURT (MELAKA) — CIVIL APPEAL NO 12–59 OF 1998
KN SEGARA J
29 APRIL 2000

Tort *— Negligence — Road accident — Duty of care to pillion rider — Duty exists unless expressly waived and in most extraordinary circumstances — Whether rider had taken care with regard to safety of pillion rider*

Tort *— Negligence — Volenti non fit injuria — Duty of care to pillion rider — Duty exists unless expressly waived and in most extraordinary circumstances — Whether rider had taken care with regard to safety of pillion rider — Whether contributory negligence on part of pillion rider*

The plaintiff was a pillion rider of a motorcycle which was involved in an accident. The plaintiff claimed for general and special damages against the first and second defendants, who were the registered owner and rider respectively of the motorcycle. The defendants raised the defence of volunti non fit injuria. The sessions court judge dismissed the plaintiff's claim. The plaintiff appealed.

Held, allowing the appeal:

(1) Based on evidence adduced, the second defendant was negligent beyond reasonable doubt — not just on a balance of probability — in the riding of the motorcycle and had taken little or no care with regard to the safety of his pillion rider. Every rider of a motorcycle owes a primary duty of care to his pillion unless expressly waived for some inexplicable reason and in the most extraordinary circumstances (see p 45E–F).

(2) The plea of volunti non fit injuria must fail and cannot avail the defendants to even establish contributory negligence on the part of the plaintiff. The sessions court judge had seriously erred in evaluating the evidence and applying the law with regard to the defence of volenti non fit injuria. The appeal on the issue of liability was therefore allowed and the defendants were to be held 100% liable in the absence of any contributory negligence pleaded and proved by the defendants against any third party (see p 45F–G).

[Bahasa Malaysia summary

Plaintif merupakan penunggang pembonceng sebuah motosikal yang terbabit dalam suatu kemalangan. Beliau menuntut ganti rugi am dan khas terhadap defendan pertama dan defendan kedua, yang masing-masing merupakan pemilik berdaftar dan penunggang motosikal. Defendan-defendan membangkitkan pembelaan volenti non fit injuria. Hakim mahkamah sesyen menolak tuntutan plaintif. Plaintif merayu.

Diputuskan, membenarkan rayuan tersebut:

(1) Berdasarkan keterangan yang dikemukakan, defendan kedua telah bertindak cuai melampaui keraguan munasabah — bukan sahaja atas imbangan kebarangkalian — dalam menunggang motosikal dan telah tidak mempedulikan keselamatan penunggang pemboncengnya. Setiap penunggang motosikal mempunyai kewajipan untuk berjaga-jaga terhadap pemboncengnya melainkan ia diketepikan untuk alasan yang tidak boleh dijelaskan dan dalam keadaan yang paling luar biasa (lihat ms 45E–F).

(2) Hujah volenti non fit injuria mesti gagal dan tidak terbuka pun kepada defendan-defendan untuk membuktikan kecuaian sertaan pada pihak plaintif. Hakim mahkamah sesyen terkhilaf dalam menilai keterangan dan memakai undang-undang berhubung dengan pembelaan volenti non fit injuria. Dengan itu, rayuan mengenai isu liabiliti dibenarkan dan defendan-defendan bertanggungjawab pada dasar 100% dalam ketiadaan apa-apa kecuaian sertaan yang diplidkan dan dibuktikan oleh defendan-defendan terhadap mana-mana pihak ketiga (lihat ms 45F–G).]

Notes

For cases on road accident, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 621–826.

For cases on volenti non fit injuria, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 850–851.

Appeal from: Summons No 53–217 of 1994 (Sessions Court, Melaka)

WS Goh (*WS Goh & Associates*) for the appellant.
Bala Gopal (*Bala Gopal & Associates*) for the respondent.

KN Segara J: This appeal before me is by the plaintiff pillion rider against the decision of the learned Sessions Court Judge, Melaka dismissing her claim for general and special damages against the first and second defendants, who were the registered owner and rider, respectively, of the motorcycle. The parties have now agreed before me on quantum at RM50,000 and the appeal is, therefore, limited to the issue of liability only.

Briefly, on 22 May 1993 the appellant ('the plaintiff') was the pillion on the motorcycle MV2357 ridden by the second respondent ('the second defendant'). The first respondent is the owner of the motorcycle. The alleged accident took place at $3^3/_4$ mile Kelebang Besar at about 11.30pm.

It is trite law to say that passengers in a motor vehicle or a pillion rider on a motorcycle are at *most times* never liable in negligence and hence there is in fact no case law wherein *a passenger* in a motor vehicle or a *pillion* rider of a motorcycle *is sued* for negligence in a motor accident. In fact, there are

several cases which would show that such victims (that is, the pillion rider or passenger) are usually awarded 100% in their claims for damages.

In this particular appeal, the record shows that after the plaintiff had finished her evidence-in-chief, the defendants' counsel applied orally, on 15 July 1998, to amend the statement of defence to include the defence of volenti non fit injuria. Counsel for the plaintiff objected to the application but, nevertheless, the learned sessions court judge granted the oral application to amend, which was made almost four years after the defence was filed. The amended statement of defence when filed, read in para 5 as follows:

> Defendan pertama dan kedua mengatakan bahawa kejadian tersebut adalah satu kejadian yang tidak dapat dielakkan yang di luar kawalan defendan kedua. *Tambahan dan (atau secara alternatif, defendan-defendan menyatakan bahawa plaintif membonceng secara sukarela pada masa kemalangan. Demi perkara ini plaintif ada cuai sumbangan dan maxim volenti non fit injuria adalah terpakai terhadap plaintif.*

Volenti non fit injuria simply means that to which a man *consents* cannot be considered an injury. No act is actionable as a tort at the suit of any person who has expressly or impliedly assented to it. No one can enforce a right which he has voluntarily waived or abandoned. Consent must be *real* and given without force, fear or fraud. Mere knowledge of a risk does not amount to consent. A motorcyclist is not entitled to claim the defence of volenti merely on the ground that his pillion knew of the risk of injury or was willing to take that risk — it must be shown that the pillion accepted for himself the risk of injury arising from the rider's lack of skill and experience or the rider's wanton display of foolhardiness and showmanship.

Ideally, when a defendant wishes to rely on volenti non fit injuria, the defendant must clearly plead:

(1) the facts of which the plaintiff was fully appraised giving rise to the risk of injury;

(2) the plaintiff understood the risk and injuly; and

(3) the plaintiff voluntarily undertook to be responsible for the risk.

In this case, the defendants have pleaded that the accident was beyond the control of the second defendant — see para 5 of the amended Statement of Defence.

> adalah satu kejadian yang tidak dapat dielakkan yang di luar kawalan defendan kedua.

If the accident was itself beyond the control of the rider, how in the world can the pillion consent to it?

The plaintiff was an innocent pillion, aged 19, at the time of the accident and the second defendant was 17 years old. In her evidence, the plaintiff testified that the second defendant used to ride the motorcycle with the front wheel lifted and on this occasion he had done the same (despite her repeated requests to him not to do so) and she had fallen off the motorcycle. It is to be noted that the plaintiff has pleaded res ipsa loquitur

— the thing speaks for itself. The maxim applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant and, without further evidence, a court would find it was so caused (by the negligence of the defendant).

The second defendant testified that he was riding his motorcycle, approximately 30 feet behind a motorcar, at a speed of about 50–60 kmh. He said the vehicle in front suddenly braked, he too braked and an on-coming motor vehicle squeezed into his path. The motorcycle was in the centre of the road.

> ... Saya tidak ada berlanggar dengan kereta di hadapan. *Kedudukan motorsikal saya di tengah-tengah jalan* — bila kereta hadapan brek dan saya brek, kereta di hadapan himpit saya. ...

It is not very clear whether the second defendant meant the motorcycle was in the centre of the dual-carriageway at 'B' on the sketch plan or, at the centre on his correct side of travel, that is, between A–B on the sketch plan. Be that as it may, *the mere fact that the second defendant had lost control of the motorcycle to the extent that it fell*, after applying 'sudden' or emergency brakes, clearly indicates that he had no control over his motorcycle and *must have been travelling too fast*, in the circumstances. If he was riding carefully and with full control, how could the motorcycle fall onto the road? As the on-coming vehicle had knocked the pillion, it is clear that the second defendant must have been riding on the *crown* of the road (rather than the left edge of the road) and that was why the on-coming motor vehicle (if any) had squeezed into his path.

In this case, the second defendant was negligent beyond reasonable doubt — not just on a balance of probability — in the riding of the motorcycle and had taken little or no care with regard to the safety of his pillion rider. Every rider of a motorcycle owes a primary duty of care to his pillion unless expressly waived for some inexplicable reason and in the most extraordinary circumstances.

Here, the plea of volenti non fit injuria must fail and cannot avail the defendants to even establish contributory negligence on the part of the plaintiff. The learned sessions court judge has seriously erred in evaluating the evidence and applying the law with regard to the defence of volenti non fit injuria. The appeal on the issue of liability is, therefore, allowed and the defendants are to be held 100% liable in the *absence of any contributory negligence* pleaded and *proved* by the defendants *against any third party*.

There shall, therefore, be judgment for the plaintiff in the sum of RM50,000 as agreed damages together with interest at 6% per annum from date of service of summons to date of judgment and, thereafter, at 8%pa till date of payment.

Appeal allowed with costs.

Appeal allowed.

Reported by Jafisah Jaafar